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No. 06-1593

IN THE

Supreme Court of the United States

RICHARD M. COWETT, M.D.,

Petitioner,

v.

TCH PEDIATRICS, INC., ET AL.

Respondents.

On Petition for a Writ of Certiorari to the State of Ohio, Mahoning County Court of Appeals, Seventh District

MOTION TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI
AND
BRIEF OF *AMICUS CURIAE* ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS, INC. IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 37.2(b) of the Rules of the Supreme Court, the Association of American Physicians and Surgeons, Inc. ("AAPS") respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of the Petition for Writ of Certiorari submitted by Petitioner Richard M. Cowett, M.D. Respondents have not granted consent, thereby making this motion necessary.

AAPS is a non-profit, national group of thousands of physicians founded in 1943, dedicated to defending the patient-physician relationship and free enterprise in medicine. AAPS has filed *amicus curiae* briefs in several federal appellate cases concerning sham peer review, and on many other important medical issues. *See, e.g.*, *Stenberg v. Carhart*, 530 U.S. 914, 933 (2000) (citing an AAPS *amicus* brief); *Springer v. Henry*, 435 F.3d 268, 271 (3d Cir. 2006) (citing an AAPS *amicus* brief in the first paragraph of the decision); *United States v. Rutgard*, 116 F.3d 1270 (9th Cir. 1997) (reversal of a sentence as urged by an *amicus* brief submitted by AAPS).

There is a growing misuse of peer review commonly known as "sham peer review." Sham peer review consists of manipulation of peer review to eliminate physicians for economic or other improper reasons. Accountability without immunity for wrongdoing is essential to deter and guard against sham peer review. AAPS has members who have been injured by bad faith or "sham" peer review, similar to what has occurred here. These physicians have lost their ability to practice medicine, and their patients have lost their access to the physicians of their choice, because of these sham peer reviews.

This Petition has national implications for the delivery of quality medical care and the integrity of professional

peer review. Patients suffer when physicians are removed from hospital staffs, and their careers ruined, based on improper motives. When immunity shields and encourages hospitals to engage in sham peer review, as occurred here, the chilling effect on good physicians is catastrophic. Few physicians will speak out in favor of patient care and preservation of life if it means risking their careers at the hands of a biased hospital committee.

AAPS submits the attached brief to explain the lack of justification for statutory immunity for "sham peer review" and to emphasize the importance of restoring integrity to peer review for the benefit of medical care nationwide.

For the above reasons, AAPS respectfully requests that this motion for leave to file the attached brief *amicus curiae* be granted.

Respectfully submitted,

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QUESTIONS PRESENTED

The Health Care Quality Improvement Act of 1986 (HCQIA) grants limited immunity to professional review bodies, such as hospitals, for professional review actions that satisfy the Act's reasonableness and due process standards.

The Act requires a "reasonable belief" as a condition of conferring immunity for peer review. Specifically, the Act limits immunity to peer review actions "taken in the **reasonable belief** that the action was in the furtherance of quality health care." 42 U.S.C. § 11112(a)(1) (emphasis added).

The questions presented are:

1. Is evidence that peer review action was motivated by economic or political reasons, unrelated to the quality of patient care, relevant to determination of HCQIA immunity on a motion for summary judgment?

2. Can immunity under HCQIA, as a matter of law, be conferred for a "professional review action" taken in bad faith?

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INTEREST OF *AMICUS CURIAE*[1]

The Association of American Physicians and Surgeons, Inc. ("AAPS") is a non-profit, national group of thousands of physicians founded in 1943. AAPS has members who have suffered from bad faith peer review, or "sham peer review," despite practicing good medicine. In many cases the sham

[1] Pursuant to Rule 37.6 of the Supreme Court of the United States, counsel for *amicus curiae* authored this brief in whole, and no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

peer reviews are initiated because a talented physician posed a competitive threat to colleagues influential at the hospital.

AAPS is dedicated to defending the practice of private and ethical medicine so that physicians may best serve their patients without interference by third parties. AAPS has filed *amicus curiae* briefs in numerous cases before the United States Supreme Court and federal Courts of Appeals, and its submissions have been cited in opinions.

Amicus has a direct and vital interest in the issues presented to this Court based on the harmful effect on the practice of medicine and the quality of patient care that results from judicially created immunity for sham peer review.

SUMMARY OF ARGUMENT

Federal law extends a special grant of immunity to medical peer review committees that act in a "reasonable belief" of furthering quality patient care. *See* Health Care Quality Improvement Act of 1986 (HCQIA), 42 U.S.C. § 11112(a)(1). The phrase "reasonable belief" could not be clearer. The noun is "belief" and the adjective is "reasonable", and thus immunity attaches only if there is (i) a belief that patient care is being improved and (ii) such belief is reasonable. This plainly encompasses both a subjective and objective element. Immunity must not attach if either element is lacking. Where the motive is wrongful, there should not be any statutory immunity. Physicians do not seek special protection, and nothing prevents hospital peer review committees from revoking the privileges of negligent physicians. But physicians do object to federal immunity that encourages wrongful behavior in destroying their careers.

As the first Justice Harlan wrote for a unanimous Supreme Court over a century ago, where the statutory "language used is so plain and unambiguous," "a refusal to recognize its natural, obvious meaning would be justly regarded as indicating a purpose to change the law by judicial action

based upon some supposed policy of Congress." *Bate Refrigerating Co. v. Sulzberger*, 157 U.S. 1, 36-37 (1895). Here the statutory language of HCQIA in requiring a "reasonable belief" is "so plain and unambiguous" as to require adherence to its textual meaning. Where, as here, the terms of the statute are clear, such terms should not be altered based on speculation about legislative intent.

Yet a 2-1 decision by the Court of Appeals for the Ninth Circuit eliminated the essential "belief" aspect of the "subjective belief" requirement. *Austin v. McNamara*, 979 F.2d 728 (9th Cir. 1992). There was no petition for certiorari pursued to reverse that decision, and it has since been reflexively repeated and followed by numerous lower federal and state courts. State courts predictably follow federal appellate interpretations of a federal statute, and the state court below adhered to the *Austin* rule. *Cowett v. TCH Pediatrics, Inc.*, 2006 Ohio 5269, 2006 Ohio App. LEXIS 5258 (Ohio Ct. App., Mahoning Cty. Sept. 27, 2006), *appeal denied*, 2007 Ohio 724, 862 N.E.2d 118 (2007). The result is that hospitals expect and receive immunity for wrongful, anti-competitive, and retaliatory peer reviews. Self-correction of this error by lower courts is increasingly unlikely.

Rampant "sham peer review" is the inevitable result of attaching legal immunity to wrongful and disingenuous discipline of professionals. The casualty is our nation's medical system and its ability to protect life, foster innovation and benefit from competition. Physicians cannot innovate or speak out for patient care when it could cost them their career at the hands of a bad faith peer review. Numerous articles, lawsuits and injustices like the case at bar are compelling testimony of how hospitals exploit their immunity for sham peer review to intimidate or eliminate good physicians.

A grant of this Petition for Certiorari is essential here to correct this error in statutory interpretation, which continues to spread at the expense of the integrity and quality of medical care.

ARGUMENT

An error in statutory interpretation by the Ninth Circuit has spread uncorrected for more than a decade, resulting in rampant sham peer reviews by hospitals. Physicians who defend life, advance innovation, or stand up for patients are intimidated, threatened and often destroyed. This is not a pattern of disciplining negligent physicians. This is an epidemic of discouraging and eliminating our finest physicians.

The root of this epidemic is a 2-1 Ninth Circuit opinion that relied on misplaced speculation about legislative intent, rather than adhering to the text of the legislation. *Austin v. McNamara, supra.* Lower courts have propagated this error, as did the state court in this action. A few other Circuit courts have uncritically adopted the same error. The result is a judicial conversion of "reasonable belief" into an "unreasonable rationalization that might be believed by others later." Legal immunity is thereby extended to protect improper motives and bad faith.

The outcome is catastrophic for medical care nationwide. Physicians are deterred from fulfilling their professional duty to speak out against hospital officials, negligent physicians who are influential within a hospital, and underperforming competitors connected with the hospital. "Sham peer review" has become a powerful deterrent to improving quality of care. The interpretation that HCQIA immunity extends to improper motives is as harmful as it is legally unjustified.

I. HCQIA's Requirement of a "Reasonable Belief" in Furthering Quality Health Care Requires Subjective Belief for Immunity.

The clear text of a statute trumps any speculation about legislative intent. "Judges interpret laws rather than reconstruct legislators' intentions. Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring). The language of HCQIA is clear: immunity can attach only to peer reviews undertaken with at least a "belief" that they further quality patient care. 42 U.S.C. § 11112(a)(1). *See also Unexcelled Chemical Corp.* v. *United States*, 345 U.S. 59, 64 (1953) (opinion of Douglas, J.); *United States* v. *Sullivan*, 332 U.S. 689, 693 (1948) (opinion of Black, J.); *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485, 492 (1947) (opinion of Jackson, J.) ("We are invited to make a lengthy examination of views expressed in Congress while this and later legislation was pending .... There is, however, no ambiguity in this Act to be clarified by resort to legislative history, either of the Act itself or of subsequent legislative proposals which failed to become law.").

A. The Plain Meaning of HCQIA Requires Subjective Belief as a Condition of Immunity.

The statutory term "reasonable belief" is not the same as "reasonable basis" or "improper belief but a proper result." Rather, the term "reasonable belief" must mean, first and foremost, a "belief" underlying the action. There is no justification for courts to look beyond this plain meaning and probe legislative history to alter it. After all, there is no legislative history for all the hundreds of Congressmen, many dozens of Senators, and President Ronald Reagan as to what they in-

tended in enacting this law. They would probably point to the text itself, as courts should do.

Yet courts, most notably the lower court here and *Austin v. McNamara*, *supra*, failed to apply the text of "reasonable belief." *See Cowett*, 2006 Ohio 5269, *12 (¶ 24) (quoting *Reyes v. Wilson Mem. Hosp.*, 102 F.Supp.2d 798, 812 (S.D. Ohio 1998)). *Reyes*, in turn, relied on a quote from *Austin*. *See id.* at 811-12 (quoting *Austin*, 979 F.2d at 734). These precedents, grounded in the initial error of *Austin*, have read the "belief" aspect of the phrase entirely out of the law, and replaced it with a purely objective test to the exclusion of all evidence of the motivating belief. As fully described in the Petition, there is ample evidence of an improper financial motivation for the revocation of Dr. Cowett's privileges and ruination of his career by reporting that revocation to the National Practitioners Data Bank. (Pet. 3-8) But all that evidence was excluded by misapplication of HCQIA.

Judge Pregerson was correct in dissenting from the *Austin* decision when he declared, "Evidence of motive and intent is relevant to show whether the defendants possessed a reasonable belief that [an adverse professional review action] was warranted by the facts known." 979 F.2d at 741 n.3 (Pregerson, J., dissenting). But other circuits, relying on the *Austin* majority, have erred as it did. *See, e.g.*, *Bryan v. James E. Holmes Reg. Med. Ctr.*, 33 F.3d 1318, 1335 (11th Cir. 1994), *cert. denied*, 514 U.S. 1019 (1995) ("The test is an objective one, so bad faith is immaterial.") (cited by *Cowett*, 2006 Ohio 5269, at *8, *11 (¶¶ 19, 23)); *see also Singh v. Blue Cross/Blue Shield of Mass., Inc.*, 308 F.3d 25, 32 (1st Cir. 2002) (collecting cases); *Sugarbaker v. SSM Health Care*, 190 F.3d 905, 914 (8th Cir. 1999), *cert. denied*, 528 U.S. 1137 (2000) ("In the HCQIA immunity context, the circuits that have considered the issue all agree that the subjective bias or bad faith motives of the peer reviewers is irrelevant.").

The Petition presents a manifest injustice resulting from allowing speculation about legislative intent to trump the

statutory text itself. *See generally* John F. Manning, "What Divides Textualists from Purposivists?," 106 Colum. L. Rev. 70 (2006); Caleb Nelson, "What Is Textualism?," 91 Va. L. Rev. 347, 349 (2005). The Petition should be granted to enforce the text of HCQIA as it was written.

B. "Reasonable Belief" Doctrine Under the Analogous Title VII Employment Law Requires Subjective Belief.

"Reasonable belief" doctrine in employment law under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, is illustrative of both subjective and objective elements. The revocation of hospital privileges is analogous to, and harsher than, a termination from employment. Title VII shields employees, giving them a type of immunity, against retaliation when the employees complain based on reasonable belief of wrongdoing by the employer. This reasonable belief requires both a subjective and an objective element.

It is rare in the employment context for the evidence to demonstrate that an employee had an objective basis for complaining but lacked a subjective belief. But when this does occur, courts dismiss the claim for failure to satisfy the subjective component of "reasonable belief." The First Circuit, for example, affirmed a district court's dismissal of a retaliation claim under Title VII for lack of a subjective belief that the challenged practices had amounted to unlawful discrimination. *Monteiro v. Poole Silver Co.*, 615 F.2d 4 (1st Cir. 1980). The First Circuit held that it was "at least as likely" that the plaintiff's complaint had an improper basis in self-protection. *Id.* at 7 (quoting the trial court). The court noted that "Title VII does not shield disruptive conduct taken in bad faith simply because some other worker might have been properly motivated in acting similarly." *Id.* at 9 n.6.

Bad faith conduct is not entitled to legal protection. Similarly, bad faith peer review is not entitled to immunity and the express terms of HCQIA do not grant such immunity.

C. HCQIA's Legislative History Does Not Support Ignoring Subjective Belief as a Condition for Immunity.

The Ninth Circuit misread the legislative history in *Austin v. McNamara* by construing the House Committee's desire for a "more objective" test as meaning an "only-objective" test. The *Austin* court wrote:

> "Initially, the [House] Committee considered a 'good faith" standard for professional review actions. In response to concerns that 'good faith' might be misinterpreted as requiring **only** a test of the subjective state of mind of the physicians conducting the professional review action, the Committee changed to a **more objective** 'reasonable belief' standard. The Committee intends that this test will be satisfied if the reviewers, with the information available to them at the time of the professional review action, would reasonably have concluded that their actions would restrict incompetent behavior or would protect patients.

979 F.2d at 734 (emphasis altered). The *Austin* court failed to recognize that the Committee was merely rejecting an "only" subjective test, rather than eliminating any and all inquiry into subjective belief.

There is no need to consult the legislative history here, but if consulted the above history does not support ignoring the subjective belief underlying the peer review. One commentator spotted the obvious flaw in the judicial elimination of a subjective test based on the legislative history:

> The legislative history of the HCQIA does not support this interpretation of the Act. Congress initially considered a good faith test; however, it was concerned that such

> a test would be "misinterpreted by courts as requiring only a test of the subjective state of mind" of the peer review committee members. Therefore, Congress adopted the "more objective 'reasonable belief' standard."

Anthony W. Rodgers, "Comment: Procedural Protections During Medical Peer Review: A Reinterpretation of the Health Care Quality Improvement Act of 1986," 111 Penn St. L. Rev. 1047, 1056 (Spring 2007) (citations omitted). Moreover, the *Austin* Court overlooked how Congress intended that HCQIA encourage "good faith professional review activities of health care entities." In fact, Congress even entitled its chapter containing the immunity provisions as follows: "Encouraging Good Faith Professional Review Activities." (JA 32a) It makes a mockery of the legislative intent of HCQIA to encourage bad faith peer review by immunizing it.

The reliance on legislative intent also omits what is strikingly absent from the legislative history: any indication that Congress sought to tilt the playing field in favor of unrestrained and unaccountable abuse of power by hospitals in eliminating innovative, competitive or outspoken physicians. The suggestion that this legislation would be used to retard medical care through "sham peer review" is far removed from the legislative history, and completely lacking as a desired or plausible result. Yet that is what has occurred by excluding all evidence of bad faith from judicial review of peer review actions.

Ignoring subjective belief is plainly contrary to the stated goal of the HCQIA: to advance the quality of medical care. Legitimate peer review is to improve patient care, not to advance improper motives of self-interest at a hospital. There should be no immunity for bad faith in peer review.

D. "Reasonable Belief" Must Include a Subjective Element to Avoid Constitutional Difficulties.

In the absence of a subjective test, immunity has been applied to protect even discriminatory conduct during peer reviews. For example, a Maryland Court relied on *Austin* to hold that sexual discrimination by peer reviewers "which would be considered illegal in the context of employment [is] irrelevant when challenging a medical peer review process." *Bender v. Suburban Hosp.*, Inc., 758 A.2d 1090, 1100 (Md. Ct. Spec. App. 2000), *cert. denied*, 362 Md. 34, 762 A.2d 968 (2000). But a statutory grant of immunity to protect a discriminatory purpose would raise grave constitutional difficulties, and such interpretation of HCQIA to immunize discrimination should be avoided.

"It has long been an axiom of statutory interpretation that 'where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 466 (1989) (citing *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988)). Sutherland's Statutes and Statutory Construction recites that a "court should construe legislative enactments to avoid constitutional difficulties if possible" and that "when possible, statutory provisions should be construed in such a way as to avoid unconstitutionality rather than simply void them on the basis of an interpretation which renders them constitutionally infirm." Norman Singer, Sutherland's Statutes and Statutory Construction 45.11, 48-49 n.4 & n.7 (5th ed. 1992).

Construing HCQIA to immunize bad faith, and even discriminatory intent, triggers constitutional issues of due proc-

ess and equal protection. Such interpretation should be rejected under the doctrine of constitutional avoidance.

II. EXTENDING IMMUNITY TO IMPROPER MOTIVES IN PEER REVIEW IS HAVING A CATASTROPHIC EFFECT ON MEDICAL PRACTICE AND PHYSICIANS.

The judicially created federal immunity for bad faith in peer review has unleashed a national epidemic of "sham peer review." *See, e.g.*, Gail Weiss, "Is Peer Review Worth Saving?", Medical Economics (Feb. 18, 2005);[2] Steve Twedt, "The Cost of Courage: How the Tables Turn on Doctors," *Pittsburgh Post-Gazette* A1 (Oct. 26, 2003);[3] John Zicconi, "Due Process or Professional Assassination?", Unique Opportunities (March/April 2001);[4] David Townsend, "Hospital Peer Review Is a Kangaroo Court," Medical Economics 133 (Feb. 7, 2000).

For years the catastrophic nature of sham peer review has also been reported in medical journals. *See, e.g.*, William Summers, "Sham Peer Review: A Psychiatrist's Experience and Analysis," *Journal of American Physicians and Surgeons* 125 (Winter 2005);[5] Roland Chalifoux, Jr., M.D., "So What Is a Sham Peer Review?", 7 *Medscape General Medicine* (No. 4) 47 (2005); John Minarcik, M.D., "Sham Peer Review: a Pathology Report," *Journal of American Physicians and Sur-*

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[2] http://www.memag.com/memag/article/articleDetail.jsp?id=147405 (viewed 1/5/07).

[3] http://www.post-gazette.com/pg/03299/234499.stm (viewed 1/5/07).

[4] http://www.uoworks.com/pdfs/feats/PEERREVIEW.pdf (viewed 1/5/07).

[5] http://www.jpands.org/vol10no4/summers.pdf (viewed 6/27/07).

geons 121 (Winter 2004);[6] Lawrence Huntoon, M.D., Ph.D., "Abuse of the 'Disruptive Physician' Clause," *Journal of American Physicians and Surgeons* 68 (Fall 2004);[7] William Parmley, "Clinical Peer Review or Competitive Hatchet Job," 36 *Journal of the American College of Cardiology* 2347 (2000).

Hospitals and their favorite physicians are motivated by money just like everyone else, and if they enjoy immunity to eliminate competitors who impinge on their income, then they will do precisely that. *See, e.g.*, Jeff Chu, "Doctors Who Hurt Doctors," Time 52 (Aug. 15, 2005) ("Th[e] system is too open to manipulation and needs reform, says the 4,000-member American Association [sic] of Physicians and Surgeons."). Medicine is a type of business, and a sweeping grant of immunity to one side of this industry is as disastrous as it is unjustified. No one would construe a law as giving immunity to one set of competitors at the expense of another in the absence of unmistakably clear language to do so. Such tilting of the competitive playing field is a recipe for disaster, and disaster has occurred.

If a physician were truly a danger to patients, then the state medical board can and will restrict or revoke his license to practice medicine. Patients themselves will abandon such a physician, just as shoppers will not continue buying bad products. Or if a hospital wants to rid itself of a negligent physician, then it is always free to do so regardless of whether it has special immunity under federal law. But immunity for wrongful acts is misplaced.

Specific examples abound of injustice to physicians – and their patients – from interpreting HCQIA to immunize sham peer review. *See, e.g., Wieters v. Roper Hosp. Inc.*, 58 F.App'x 40, 46 (4th Cir. 2003). There a physician on the peer

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[6] http://www.jpands.org/vol9no4/minarcik.pdf (viewed 6/27/07).

[7] http://www.jpands.org/vol9no3/huntoon.pdf (viewed 6/27/07).

review committee admitted in writing that the process was flawed and that Dr. Wieters was a good physician. *Id.* The panel member also admitted that the peer review was the result of a vendetta against Dr. Wieters. *Id.* Unmoved by evidence of bad faith, the Fourth Circuit affirmed a grant of immunity to the hospital.

Judicial construction of HCQIA to grant immunity to hospitals for bad faith peer review has caused an epidemic of abuse, and this problem is not likely to correct itself in the lower courts.

CONCLUSION

This Court should grant the Petition for *Writ of Certiorari*.

Respectfully submitted,

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